

Federal Communications Commission
Washington, D.C. 20554

In reply refer to:
2000C3-CML

February 23, 2000

Merryville Investments
135 Ambler Way
Alpharetta, Georgia 30202

Location: LaGrange, Loganville, McDonough,
Newman, Rome, and Snellville, Georgia
Frequency: 929.4625 MHz
File Numbers: D020949, D015423, D020950,
D020951, D020956, D020957

Dear Gentlemen:

This responds to your petition for reinstatement *nunc pro tunc* of the above referenced applications and your request for waiver of the paging application freeze. Specifically, in the event your petition for reinstatement is denied, you request alternate relief in the form of a waiver of the Commission's *Second Report and Order*, WT Docket 96-18, to allow the filing of new applications for base stations operating on frequency 929.4625 MHz. For the reasons set forth below, your petition for reinstatement and request for waiver are denied.

On February 7, 1996, Merryville Investments ("Merryville") filed applications to operate on 929.4625 MHz at the six above referenced locations in Georgia. All of the above referenced applications were dismissed by the Land Mobile Branch ("Branch") of the FCC on July 9, 1996, except D015423, which was dismissed on May 8, 1996, for failure to provide proper coordination as per Section 90.175 of the Commission's rules. On July 30, 1996, Merryville filed a petition for reinstatement *nunc pro tunc* of the above referenced applications and a request for a waiver of the paging filing freeze to allow the applications to be coordinated.

In your petition, you state that you attempted to coordinate the applications with the Personal Communications Industry Association ("PCIA"), the frequency coordinator for the 929 MHz band. You state that the presence in the Commission's database of an invalid licensee on 929.4625 MHz, Yvonne Zaremba, prevented PCIA from successfully coordinating your applications for certain locations. You argue that there were no lawful applications or licenses for this frequency to block your applications, but that due to the Commission's delay in updating its database, you were unable to coordinate and file the above referenced applications prior to the freeze. You further argue that time constraints imposed on PCIA by the filing freeze deadline prevented PCIA from coordinating the locations that were not blocked by the Zaremba license. You also state that PCIA forwarded your applications to the FCC without coordination at your request.

On February 8, 1996, the Commission released a *Notice of Proposed Rule Making*, which imposed a freeze

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on most new applications for paging facilities.¹ The freeze was imposed in conjunction with the Commission's proposal to convert from site-by-site licensing of paging channels to licensing on a geographic area basis.² In the absence of a waiver, the freeze thus prevents you from refiling your dismissed applications for exclusivity.

We hold, first, that your petition for reinstatement *nunc pro tunc* is denied. The Branch dismissed your applications because they were defective on their faces. Nothing has occurred since the dismissal that changes the defect in your applications. You were seeking local exclusivity for the 929.4625 MHz frequency in the Rome/Newman/La Grange, Georgia area but failed to obtain unconditional coordination as then required by Sections 90.175 and 90.495 of the Commission's Rules.³ Furthermore, unconditional coordination was correctly denied because the Zaremba license had not been deleted from the Commission's database.⁴ The applications were properly dismissed on the existing facts.

With respect to your alternative request for waiver, the Commission imposes a strict burden on parties seeking waiver of the Commission's rules. You must demonstrate either: (1) that the underlying purpose of the rule would not be served or would be frustrated by application to your particular case, and that grant of a waiver is otherwise in the public interest, or (2) that the unique facts and circumstances of your case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that you have no reasonable alternative.⁵ We find that you have not made the requisite showing here.

First, we have not treated you differently than we have treated similarly situated applicants.⁶ Although your application was filed prior to the freeze, the application was properly returned as defective. You have been

¹ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Notice of Proposed Rule Making*, 11 FCC Rcd. 3108 (1996). The freeze is subject to limited exceptions, none of which is relevant here.

² *Id.* The Commission subsequently adopted paging rules for geographic area licensing. See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd. 2732 (1997), *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd. 10030 (1999).

³ 47 C.F.R. § 90.175; 47 C.F.R. § 90.495 (1996).

⁴ See Amendment of Parts 1 and 90 of the Commission's Rules concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Report and Order*, 6 FCC Rcd. 7297, 7301-7302, ¶ 25 (*PLMRS Report and Order*) ("Under no circumstances will we accept an application for a particular frequency until that frequency has actually been deleted from our database . . .").

⁵ 47 C.F.R. § 1.925(b)(3); see also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). The waiver standard for Private Land Mobile Services was formerly codified at Section 90.151(a) of the rules, 47 C.F.R. 90.151(a) (1995). See Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, WT Docket No. 98-20, *Report and Order*, 13 FCC Rcd. 21027 (1998) (streamlining and recodifying rules governing license application procedures). We find that it is immaterial to the result in this case which formulation of the waiver standard we apply.

⁶ See *Always Answering Service, Inc.*, FCC 00-36 (rel. February 14, 2000).

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afforded the same treatment as any other non-incumbent applicant who was unable to file a valid paging application prior to February 8, 1996. Second, application of the freeze to you and similarly situated parties promotes the purpose of preserving the existing licensing landscape during the transition to geographic area licensing.⁷ Thus, you have failed to show that applying the application freeze to you is inequitable, inconsistent with the purpose of the freeze, or contrary to the public interest. We further note that you had the opportunity to participate in the auction of geographic area paging licenses for the frequency that you seek that is scheduled to begin on February 24, 2000.⁸

You present no arguments in your petition for reinstatement that would lead us to reconsider the Land Mobile Branch's decision. We therefore affirm the Branch's decision for the reasons stated therein and deny your petition for reinstatement and request for waiver.

Sincerely,

Roger Noel, Chief
Licensing & Technical Analysis Branch
Commercial Wireless Division

⁷ See *Notice of Proposed Rule Making*, 11 FCC Rcd. at 3136, ¶ 139.

⁸ See Auction of 929 and 931 MHz Paging Service Spectrum, *Public Notice*, DA 99-1591 (rel. Aug. 12, 1999).